(2) Supreme Court, U.S.
FILED

001498 MAR 28 2001

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Ray Sienkiewicz,

Petitioner,

v.

John McDougall, individually, and Rod Shoap, as Sheriff of Lee County, Florida, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

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App

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Report and Recommendation of 1a
Magistrate Judge, filed April 28, 2000

Docketing letter from the United States Court .. 7a
of Appeals, Eleventh Circuit, dated
August 7, 2000

SUPPLEMENTAL APPENDIX

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION
(filed: April 28, 2000)

ROBERT SMITH, ET AL.,
Plaintiffs,

-vs- **Case No. 2:99-cv-385-FtM-21D**

JOHN MCDOUGALL, INDIVIDUALLY AND AS SHERIFF OF LEE COUNTY, FLORIDA, et al.,[1]
Defendants.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motion filed herein:

MOTION: MOTION TO DISMISS (Doc. No. 5)
FILED: September 7, 1999

THEREON it is RECOMMENDED that the motion be GRANTED

[1]In the caption of the Complaint, the Plaintiffs list John McDougall, individually and as Sheriff and then "et al" after the Sheriff. The Plaintiffs fail to list who the other defendants are in this case, although at times, the Plaintiffs do refer to a John or Jane Doe but no service appears to be affected on these individuals.

This action was filed pursuant to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §248. The Defendant argues that the Complaint fails to state a cause of action under 18 U.S.C. §248 in that it does not provide a civil remedy for the Plaintiffs' allegations. The Plaintiffs respond that 18 U.S.C. §248 protects them and that the Defendant violated the statute.

FACTS[2]

Southwest Florida Women's Clinic ("Clinic") is located in a privately owned strip shopping center, which includes a parking lot and sidewalk. (Com.[3]¶11) Abortions are performed at the Clinic. (Com.¶11) Plaintiffs Robert Smith and Ray Sienkiewicz aver that they are "sidewalk counselors" outside of the Clinic and do not allege that they are affiliated with the Clinic. (Com.¶7, 10, 12) "Sidewalk counselors" offer "love and help" and allegedly reproductive health services at abortion clinics. (Com.¶7) On July 13, 1999, Plaintiffs were using a "reasonable portion of the sidewalk and parking lot" to provide reproductive health services such as "counseling of women and men as to the spiritual, moral, medical, physical and psychological health aspects of adoption, and abortion; the nature of this particular facility; the problems and risks associated with this particular facility; determining the needs of the individuals approaching or leaving the facility; and, offering written and verbal referral information to other related care-givers." (Com.¶12) Plaintiffs claimed that they were threatened and intimidated by the Defendant John McDougall through his deputies and equipment. (Com.¶13) The threats and intimidation were

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[2]The facts asserted by the Plaintiffs in their Complaint (Doc. 1) are taken as true for the purposes of this Motion to Dismiss only.

[3] "Com" refers to the Complaint (Doc. 1)

comprised of Sheriff McDougall ordering his deputies to threaten the Plaintiffs with physical removal from the facility. (Com.¶14) The Plaintiffs are in fear that Sheriff McDougall, through his deputies, will physically harm them. (Com.¶15)

STANDARD FOR MOTION TO DISMISS

A complaint should not be dismissed on the ground that the plaintiff's complaint failed to state a claim "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"
Jones v. Board of Commissioners of the Alabama State Bar, 737 F.2d 996 (11th Cir. 1984) citing *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corporation*, 711 F.2d 989 (11th Cir. 1983) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d80 (1957). "A trial court, in ruling on a motion to dismiss, is required to view the complaint in a light most favorable to the Plaintiff." *Sofarelli v. Pinellas County*, 931 F.2d 718, 721 (11th Cir. 1991). Although the Court must take the allegation in a complaint as true when reviewing motions to dismiss, it is not permitted to read into the complaint facts that are not there. *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 2944-45, 92 L.Ed. 2d 209 (1986), *Beck v. Interstate Brands Corp.*, 953 F.2d 1275, 1276 (11th Cir. 1992). "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is, as we have stated previously, 'exceedingly low.'" *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) citing *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corporation* 711 F.2d 989, 995 (11th Cir. 1983).

ANALYSIS

The Defendant argues that the Plaintiffs' allegations of intimidation by law enforcement officers are not a violation of FACE on the grounds that the Plaintiffs were not in a facility and did not provide reproductive health services. The Plaintiffs respond that the definition of "facility" in the statute should include those outside of the facility and that their counseling was providing individuals with reproductive health services. The purpose of FACE is to "protect and promote the public safety and health services . . . [of] persons seeking to obtain or provide reproductive health services." 18 U.S.C. §248, "Congressional Statement of Purpose" FACE provides in part as follow:

> **(a) Prohibited activities.** - Whoever-
>
> (1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services: . . . shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection(c) . . .
>
> **(c) Civil remedies.** -
>
> **(1)Right of action.** -
>
> **(A) In general.** - Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services . . .
>
> **(e) Definitions.** - As used in this section:
>
> **(1) Facility.** - The term "facility" includes a

> hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located . . .
>
> **(5) Reproductive health services.** - The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive system, including services relating to pregnancy or the termination of a pregnancy.

18 U.S.C. §248 (emphasis added) The Plaintiffs allege that they were providing reproductive health services pursuant to 18 U.S.C. §248(a)(1) The Court will assume for the purposes of this Motion to Dismiss that the services the Plaintiffs were providing may be considered reproductive health services as defined in 18 U.S.C. §248(e)(5) on the grounds that the Plaintiffs claim that they provided medical and physical counseling. For protection under FACE, however, the Plaintiffs must show that they were providing their services "in a facility." The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services. The Plaintiffs claim that they are "sidewalk counselors" and do not claim to be counseling in a facility, but rather outside the Clinic (which is not the Plaintiff's facility). It is undisputed that the Plaintiffs were not inside the Clinic when providing their counseling. The Court does agree with the Plaintiffs that FACE applies equally to pro-life advocates as well as pro-choice advocates as evidenced in the case of *Greenhut v. Hand*, 996 F.Supp 372 (D.N.J., 1998). However, in *Greenhunt*, the pro-life association was in a facility of its own. *Id.* at 374. The Court will not expand the definition to include the grounds surrounding a facility totally

unrelated to the Plaintiffs. Therefore, the Court finds that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief.

Therefore, it is respectfully recommended that the Motion to Dismiss (Doc.5) be granted and this case dismissed.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Chambers in Ft. Myers, Florida.

DATED: April 28th, 2000

/s/
DOUGLAS N. FRAZIER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Presiding District Judge
Counsel of Record
Unrepresented Parties

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In replying Give Number
Of Case and Names of Parties

August 07, 2000

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-13805-II Robert Smith v. John McDougall
DC DKT NO.: 99-00385 CV-FTM-21D

THIS APPEAL IS GOVERNED BY MORE STRINGENT PROCEDURES FOR REQUESTING EXTENSIONS OF TIME TO FILE BRIEFS AND RECORD EXCERPTS IN CIVIL APPEALS. NEW PROCEDURES ALSO PROVIDE FOR DISMISSAL WITHOUT FURTHER NOTICE IN CIVIL APPEALS WHEN A BRIEF OR RECORD EXCERPTS IS NOT FILED OR CORRECTED WITHIN TIME PERMITTED. PLEASE SEE ENCLOSED NOTICE AND REVISED RULES.

Eleventh Circuit Rule 31-1 requires that APPELLANT'S BRIEF AND RECORD EXCERPTS BE SERVED AND FILED WITHIN FORTY (40) DAYS FROM July 21, 2000.

The above date is the date the appeal was docketed in the court of appeals, as provided by the 11th Cir. R.12-1.

THIS IS THE ONLY NOTICE YOU WILL RECEIVE CONCERNING THE DUE DATE FOR FILING BRIEFS. See Fed.R.App.P. 28, 30, 31 and 32, and the corresponding circuit rules, for further information on preparing briefs and record excerpts. Motions for extensions of time to file a brief are frowned upon by the court.

A current copy of the district court docket sheet, which shows papers comprising the record, is available from the district clerk. Counsel or parties are requested to use the district court docket sheet and their own file copies of court papers in preparing the brief and record excerpts. Counsel or parties may also review the record at the office of the district court clerk. Please refer to the enclosed sheet for information on referencing the record. Upon notice that all appellees' briefs have been filed, the record will be promptly sent to this office by the district court clerk.

Sincerely,

THOMAS K. KAHN, Clerk

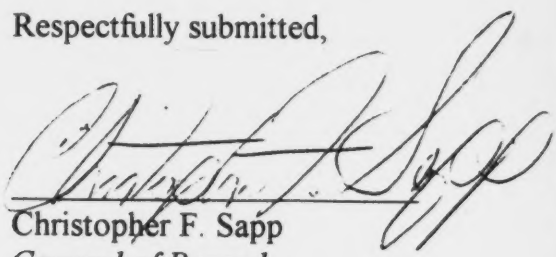
Reply To: Tonya Dumas (404)335-6178

Encl.

BR-1 (1-2000)

The foregoing appendices are hereby submitted as a supplement to the Petition For Writ Of Certiorari.

Respectfully submitted,



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